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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

OLEKSANDR KASIANOV,

Defendant and Appellant.

C086912

(Super. Ct. No. 17FE011597)

A jury found defendant Oleksandr Kasianov guilty of four crimes committed against his wife: 1) attempted kidnapping (Pen. Code §§ 664, 207, subd. (a));<sup>1</sup> a lesser included of count one, kidnapping); 2) misdemeanor battery (§ 242; a lesser included of count two, sexual battery); 3) assault with intent to commit oral copulation (§ 220; count

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<sup>1</sup> Further undesignated statutory references are to the Penal Code.

three); and 4) false imprisonment (§ 236; count four). The trial court sentenced him to an aggregate prison term of six years ten months in prison.

Defendant appeals, contending: 1) Evidence Code section 1109 is unconstitutional on its face; 2) the trial court erred in imposing consecutive sentences and imposing certain fees without first determining defendant's ability to pay; 3) defendant's counsel was ineffective for failing to object to the imposition of fines, fees, and assessments at sentencing; and 4) the case must be remanded to clarify the bases for assessments imposed at judgment.

Our review of the record has disclosed that the trial court failed to impose sentence on count four. This is error requiring remand for a new sentencing hearing to include consideration of all counts of conviction. At the new sentencing hearing, the trial court will have the opportunity to clarify the bases for certain fees and related assessments that we describe in detail *post*, and defendant will have the opportunity to claim inability to pay, should he choose to do so.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *Evidence at trial*

The case against defendant went to trial in March 2018. Wife disclaimed any memory of much of what she had previously told authorities, and her account of the relevant events had changed. She conceded she did not want to testify against defendant and had tried several times to have the case dismissed. Her two recorded statements to law enforcement were played for the jury, as was her 911 call.

Largely through wife's prior statements, the People presented evidence that she was married to defendant but had moved out of their apartment and told him their marriage was over. Defendant told her she could come retrieve her belongings from their apartment and that no one would be there. Wife went to the apartment, but defendant arrived shortly after her arrival. They talked for approximately 10 to 15 minutes, and defendant became increasingly upset.

Wife saw defendant was hiding something behind his back in a Home Depot bag. He took out a roll of duct tape, grabbed her, and wrapped it around her head, covering her mouth. He tried unsuccessfully to wrap her wrists and then took down her pants and panties to her ankles. He told her that he missed her and wanted to be with her, and forcibly kissed her and grabbed her inner thigh. He indicated he wanted to kiss her vagina. She struggled against him, and a short time later, he appeared to realize what he was doing was wrong and said as much. He removed the tape from her mouth, but nearly two feet of tape remained stuck in her hair. Defendant apologized and said they should go take a bath together to calm down. He pushed his wife into the bathroom and blocked the entrance. He started running the bath and was taking off his clothes when his wife pulled up her pants and ran from the bathroom. She begged defendant to let her go, and he eventually agreed.

At trial wife denied defendant had ever been physical with her, but she had told the police that defendant had engaged in a similar incident about a year before when he had grabbed her, pulled her to the floor, poured water on her face, and hit her. In a recorded call from the jail, defendant pressured wife to say that they were role-playing and that he was acting lovingly. Wife consistently refused, stating multiple times that she had told authorities the truth and would not lie.

The People presented an expert regarding intimate partner battering, who explained the cycle of abuse, that 40 to 60 percent of victims stay in the abusive relationship, and that 60 percent fail to cooperate with law enforcement prosecutions of the abuser.

Defendant testified on his own behalf that on the day in question, he came to the apartment with his lunch box, but no duct tape. They discussed divorcing, but wife did not want to. She started throwing things at him, hitting him approximately 10 times. Wife complained that defendant did not love her anymore and that no one would want her because of her age. Wife had the duct tape for wrapping, and it became lodged in her

hair as she was upset and gesturing. They tried unsuccessfully to remove the tape. He tried to escape their fight by going to the bathroom, but she followed him. He took off his shirt, and she started to undress as well, taking off her pants. Defendant told her he wanted to shower alone, and she became angry. When he went to leave, she beat him to it and left first. Wife's statement to authorities that he had wanted to perform oral sex on her was disrespectful of him in their (Ukrainian) culture. Defendant denied that he had previously pushed wife to the ground and poured water on her. He explained he had sprinkled water on her face in the shower in response to her doing the same to him.

### *Sentencing*

Despite wife's request that defendant not be punished, the trial court sentenced defendant to the upper term of six years in prison on count three (assault with intent to commit oral copulation) and 10 months consecutive for count one (attempted kidnapping), and 180 days concurrent for count two (simple battery).<sup>2</sup> The court also imposed various fines, fees, and assessments through incorporation of the probation report including a \$1,500 restitution fine (§ 1202.4, subd. (b)), a \$1,500 suspended parole revocation fine (§ 1202.45), four \$40 court operations assessments (§ 1465.8), four \$30 conviction assessments (Gov. Code, § 70373), a \$402.38 main jail booking fee (Gov. Code, § 29550.2), a \$90.65 mail jail classification fee (Gov. Code, § 29550.2), \$702 in costs for the investigation and presentence probation report (§ 1203.1b), and a \$300 serious habitual offender fine (§290.3), plus \$130 in penalty assessments. Defendant's counsel did not object or otherwise indicate that defendant would be unable to pay these amounts.

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<sup>2</sup> The abstract of judgment reflects the trial court stayed imposition of sentence on count four (false imprisonment) pursuant to section 654, but this count was not mentioned by the sentencing judge at the oral pronouncement of sentence, an error we discuss *post*.

## DISCUSSION

### I

#### *Admission of Defendant's Prior Violence*

Defendant argues the admission of his prior uncharged domestic violence under Evidence Code section 1109 was unconstitutional on its face. While conceding that previous courts have upheld the facial constitutionality of that code section (see, e.g., *People v. Johnson* (2000) 77 Cal.App.4th 410, 412), he argues those cases were wrongly decided and that admission of his prior act against wife violated his state and federal rights to due process by allowing the admission of propensity evidence, which in turn reduced the prosecution's burden of proof. We see no reason to revisit the well-established law concluding this section is constitutional. (*Johnson*, at p. 412; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310 ["the constitutionality of section 1109 under the due process clauses of the federal and state constitutions has now been settled"].) Defendant's first claim fails.

### II

#### *Challenge to Consecutive Sentencing*

Defendant next argues the trial court "erred in electing to impose consecutive sentences on counts one and two." For many reasons, this argument fails as well.

First, count one (a sentence of 10 months for attempted kidnapping) was run consecutively to count *three* (a six year sentence for assault with intent to commit oral copulation), *not* count *two*. Count two was run concurrently to the sentence imposed on counts three and one, as detailed above. Despite the fact that the Attorney General pointed out this error in his responsive brief, defendant repeated the error in his reply.

Second, while defendant argues the court should have engaged in a "thorough examination of the charges in accordance with" section 654, he does not argue that section 654 applies to any count of conviction. He purports to argue double counting, noting (incorrectly) that the trial court "decided not to exercise its discretion" and apply

section 654 “on the kidnapping charge in part because it was a separate act of violence” and arguing that the court relied “upon the same factor to impose a consecutive sentence.” But the trial court was not asked to and did not analyze the application of section 654 to *any* of the counts at the sentencing hearing. The argument is nonsensical and based on assertions not supported by the record.

Third, assuming the intended argument is that the trial court erred in imposing a consecutive rather than concurrent sentence on count one because the court’s reasons for imposing consecutive sentences did not comply with requirements of California Rules of Court, rule 4.425, the argument is forfeited. No objection was raised in the trial court. The probation report recommended a consecutive sentence on count one, but no sentencing brief appears in the record, and at the hearing defense counsel asked only for a finding of unusual circumstances and probation for defendant. However, because the Attorney General does not raise forfeiture and defendant claims ineffective assistance of counsel in other aspects of his case, we address the merits of the claim.

Section 669 “grants the trial court broad discretion to impose consecutive sentences when a person is convicted of two or more crimes.” (*People v. Shaw* (2004) 122 Cal.App.4th 453, 458.) “The sentencing rules specify several criteria to guide the trial court’s determination whether to impose consecutive or concurrent terms.” (*Ibid.*) California Rules of Court, rule 4.425, sets forth factors to be considered by the trial court in deciding whether to impose consecutive or concurrent sentences. These factors include: “(1) The crimes and their objectives were predominantly independent of each other; (2) The crimes involved separate acts of violence or threats of violence; or (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.” (Cal. Rules of Court, rule 4.425(a)(1)-(3).) “Only one criterion or factor in aggravation is necessary to support a consecutive sentence.” (*People v. Davis* (1995) 10 Cal.4th 463, 552.) We review the trial court’s determination to impose consecutive

sentences for abuse of discretion (*People v. Bradford* (1976) 17 Cal.3d 8, 20, questioned on other grounds in *People v. Dawkins* (2018) 24 Cal.App.5th 698, 706), and we review the rule 4.425 findings of the trial court for substantial evidence. (*People v. Oseguera* (1993) 20 Cal.App.4th 290, 294

Here, after sentencing defendant for the assault with intent to commit oral copulation (count three), the trial court found that the attempted kidnapping (a lesser included of count one) was “a separate act of violence and that it increased the risk of harm to the victim, and further that the defendant could have paused and reflected after duct taping the victim and to make the decision to cease his criminal conduct but he chose not to do so.” Substantial evidence supports this finding, which encompasses at least two and arguably all three of the factors we have recited above.

The evidence presented at trial established that defendant took down wife’s pants and panties to her ankles, forcibly kissed her, and told her he wanted to perform oral sex on her after grabbing at her inner thigh. This was the conduct comprising the assault with intent to orally copulate wife (count three).

Wife struggled against defendant, and a short time later he removed the tape from her mouth and apologized. He then engaged in the conduct comprising the attempted kidnapping (a lesser included of count one), *pushing* wife into the bathroom and blocking the door. Defendant has provided no authority establishing that his pushing the victim into the bathroom against her will could not be properly classified as a separate act of violence and thus qualify him for consecutive sentencing. Further, the trial court’s finding that the events were separate acts with time between them to pause and reflect is amply supported by the evidence. As we have described, the evidence showed that defendant stopped the assault, removed the tape from wife’s mouth, questioned his conduct, and apologized before then pushing her into the bathroom against her will and demanding she stay there and bathe with him. The trial court did not abuse its discretion in running counts one and three consecutively.

### III

#### *Defendant's Ability to Pay*

Defendant specifically challenges on ability to pay grounds two fees imposed under Government Code section 29550.2, subdivision (a), a fee under section 1203.1b, and the fines, fees, and associated penalty assessments imposed under section 290.3. He adds that counsel was ineffective for failing to object to the fees' imposition.

Given our determination that we must remand for sentencing on count four, we need not address defendant's remaining arguments concerning his ability to pay and the trial court's failure to identify the statutory bases and specific amounts of all fines and fees imposed. These issues may be resolved on remand.

At the resentencing, the trial court must orally impose sentence on count four and then stay execution thereof pursuant to section 654 if that is what it intended to do. It is well settled that when a court determines that a conviction is subject to section 654, it must *impose* a sentence and then stay the *execution* of that sentence, the stay to become permanent upon defendant's service of the portion of the sentence not stayed. (*People v. Duff* (2010) 50 Cal.4th 787, 796; *People v. Relkin* (2016) 6 Cal.App.5th 1188, 1197-1198; *People v. Alford* (2010) 180 Cal.App.4th 1463, 1469; *People v. Salazar* (1987) 194 Cal.App.3d 634, 640.) "This procedure ensures that the defendant will not receive 'a windfall of freedom from penal sanction' if the conviction on which the sentence has not been stayed is overturned." (*Salazar*, at p. 640.) It is improper to simply stay the imposition of sentence. (*Duff*, at pp. 795-796; *Alford*, at p. 1468.) The court here imposed an unauthorized sentence by failing to impose a sentence on count 4 and then stay execution of that sentence. (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1327.) On remand, all aspects of the sentence may be revisited. (See *People v. Buycks* (2018) 5 Cal.5th 857, 893 [a resentencing court may modify every aspect of sentence pursuant to full resentencing rule].)



The trial court is directed to specifically and separately delineate for the record the statutory bases and amounts of all fines, fees, and assessments imposed.<sup>3</sup> Defendant may object to the proposed fines, fees, and assessments at his resentencing and counter the People's evidence of ability to pay or present his own evidence of his alleged inability to pay, should he choose to do so.

### **DISPOSITION**

The case is remanded for resentencing as described in this opinion and affirmed in all other respects.

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/s/  
Duarte, J.

We concur:

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/s/  
Blease, Acting P. J.

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/s/  
Murray, J.

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<sup>3</sup> This court's review has also disclosed an error in the calculation of the penalty assessment for the \$300 section 290.3 base fine, which the trial court should correct on remand if the fine is reimposed. (See *People v. Johnson* (2015) 234 Cal.App.4th 1432, 1458 [total penalty assessment for a section 290 fine is \$930].)